(2017) 08 CAL CK 0020

In the Calcutta High Court

Case No : 26172 (W) of 2015

BMA Stainless Ltd. & Anr. APPELLANT

Vs

State of West Bengal & Ors. RESPONDENT

Date of Decision : 17-08-2017

Acts Referred:

Bengal Electricity Duty Act, 1935, Section 3 - Duty on units of energy consumed

Citation : (2017) 08 CAL CK 0020

Hon'ble Judges : Debangsu Basak

Bench : SINGLE BENCH

Advocate : Pratap Chatterjee,?Shyamal Sarkar, ?Rajesh Gupta,?Amitava Mitra, ?Parag Chaturvedi,?Tapan Mukherjee, ?Prithu Dudhuria

Judgement

1. A decision dated May 28, 2015 negating the claim for

disbursement under the West Bengal Incentive Scheme,

2004 is under challenge in the present writ petition.

2. Learned Senior Advocate for the petitioners has submitted

that, the first petitioner is entitled to subsidy under the

West Bengal Incentive Scheme, 2004. He has referred to the Scheme of 2004. He has referred to the correspondence

exchanged between the parties with regard thereto. In

particular reference to a writing dated May 22, 2014 issued

by the first respondent, learned Senior Advocate for the

petitioner has submitted that, the quantum of incentive

received by the first petitioner being Rs.2,116.49 Lakhs is admitted. As against the admitted quantum received by the first petitioner, the respondent no. 1 is seeking to adjust waiver of electricity duty claiming that the first petitioner has allegedly received Rs.679.85 Lakhs in excess. The same is not permissible inasmuch as the electricity duty spoken of in the writing dated May 22, 2014 and elsewhere, is not chargeable inasmuch as the same was not leviable under the statute. He has referred to the provisions of the Bengal Electricity Duty Act, 1935 particularly Section 3 thereof. Since the first petitioner is exempt from paying such electricity duty under such statute, it cannot be said that, the first petitioner is liable to pay such duty. Since the first petitioner is not liable to pay such duty, the question of the first petitioner receiving the benefit of duty waiver does not arise. Therefore, the first respondent is incorrect in claiming that the first petitioner has received a sum of Rs.679.85 Lakhs in excess under the West Bengal Incentive Scheme, 2004.

3. Opposing the contentions of the petitioners, learned Senior Advocate for the State respondent has submitted that, the West Bengal Incentive Scheme, 2004 read as a whole, contemplates and stipulates a maximum limit of incentive to be received thereunder. Receipt of waiver of electricity duty by a constituent governed under the Scheme of 2004 is to be taken into consideration for the purpose of calculation of the receipt of incentives under the Scheme of 2004. A constituent entitled to the disbursements under the Scheme of 2004 can receive upto 100% of the Fixed Capital Investments. The Fixed Capital Investment of the first petitioner is Rs.1,436.64 Lakhs. The first petitioner has

actually received a sum of Rs.2,116.49 Lakhs. Therefore, the first petitioner has received Rs.679.85 Lakhs in excess. The first petitioner has received electricity duty waiver on its application. Therefore, the value of such waiver has to be taken into consideration as a component under the Scheme of 2004 for calculating the receivable under such Scheme. He has referred to the writing dated July 26, 2007 enclosing the eligibility certificate for the Scheme of 2004 and the enclosures thereto. In support of his contentions, learned Senior Advocate for the State respondent has relied upon 2004 Volume 8 Supreme Court Cases page 229 (Krishna Bahadur v. Purna Theatre & Ors .) and 2014 Volume 11 Supreme Court Cases page 744 (Shiv Chander More & Ors. v. Lieutenant Governor & Ors.).

4. Is the State entitled to the refund of Rs.679.85 Lakhs along with interest as held in the writing dated May 22, 2014, is the issue in the present writ petition.

5. A reasoned Order dated May 28, 2015 is under challenge in the present writ petition. By the impugned order, the authorities have demanded a sum of Rs.679.85 Lakhs in three equal installments payable monthly from the first petitioner. The impugned order provides that, in case of default, interest at the prevailing rate as fixed by the Reserve Bank of India would be levied on the outstanding amount. The first installment was directed to be paid within 30 days from the date of the impugned order.

6. The petitioner carries on business as a manufacturer of iron and steel products. It has a factory at Kalyaneshwari, Burdwan. It has two electric furnaces which runs on electricity. Its Unit has started commercial production on

July 3, 2006. The petitioner had applied for a certificate for registration under the West Bengal Incentive Scheme, 2004. An eligibility certificate was issued to the first petitioner under cover of a letter dated July 26, 2007. The eligibility certificate annexed to the writing dated July 26, 2007 provides that, the first petitioner would be eligible for one/more than one incentive(s) with effect from July 19, 2017 for the period mentioned against the item(s) of incentive(s) shown in the attached annexure. The annexure to the eligibility certificate of the first petitioner has five items. One of them being waiver of electricity duty. The Directorate of Electricity is designated to be the authority to be approached for availing the waiver of electricity duty. Such annexure also provides that, the period for which the incentive would be available would be as per paragraph 10.1 of the Scheme of 2004. The eligibility certificate is not under challenge in the present proceedings. The parties are, therefore, bound by the terms and conditions contained in the eligibility certificate. The first petitioner had accepted the eligibility certificate and had acted thereon. It had obtained the waiver of electricity duty under Section 3 of the Bengal Electricity Duty Act, 1935 read with its second Schedule with effect from July 3, 2006 for a period of five years, that is, up to July 7, 2011.

7. Section 3 of the Bengal Electricity Duty Act, 1935, is as follows:-

"3. Duty on units of energy consumed. - (1) Subject to the provisions of [sub-section (3),] there shall be charged, levied and paid to the State Government a duty (hereinafter referred to as ''electricity duty''), [on the net charge for energy consumed or the units of energy consumed, as the case may be,] at the rtes specified in the First Schedule ; Provided that during a period of one year with effect from -

(a) the 1st day of June, 1979, no electricity duty [on the net charge for energy consumed or the units of energy consumed, as the case may be,] shall be payable by a person (other than a licensee) who generates energy from a diesel generating plant, or

(b) the 1st day of April, 1985, no electricity duty [on the net charge for energy consumed or the units of energy consumed, as the case may be,] shall be payable by a person (other than a licensee) who generates energy from a [coal-based generating plant, or

(c) the 1st day of February, 1990, no electricity duty [on the net charge for energy consumed or the units of energy consumed, as the case may be,] shall be payable by a person (other than a licensee) who generates energy from a waste-gas-based generating plant, registered under section 7B, for his own consumption for any industrial or manufacturing process (including cold storages and cinema houses), and for such other purposes as the State Government may, by notification in the Official Gazette, specify in this behalf.

Explanation.- For the purposes of this proviso, "own consumption" shall not include any consumption for domestic purposes :

Provided further that the State Government may, by notification in the Official Gazette, extend the period referred to in the first proviso from time to time but such extension shall not exceed a period of one year at a time :

Provided also that where any electricity duty is charged, levied or paid at the rates specified in any of the clauses of any article of Part C of the First Schedule, such duty may be charged, levied or paid, monthly for a period of three consecutive months on the basis of average monthly consumption during the three months immediately preceding the period as aforesaid, in such manner, in such areas, for such class of consumers and subject to such conditions as may be prescribed.

Explanation.- The expression "month" shall mean a period of not less than 25 days and not more than 35 days and shall be computed in the manner prescribed.

(2)(a) The special rate of duty referred to in [sub-clause

(ii) of clause (b) of article 2] of Part b of the First Schedule shall not be admissible unless-

(i) the cost of energy consumed for purposes of electrolysis or heating in eclectic furnaces in twenty per cent. or more of the total cost of manufacture by electrolysis or heating in eclectic furnaces, and

(ii) separate books of account are maintained showing separately the details of the cost of energy consumed for purposes of electrolysis or heating in eclectic furnaces and the total cost of manufacture by electrolysis or heating in eclectic furnaces.

(b) An industrial undertaking claiming the benefits of the special rate of duty referred to in [sub-clause (ii) of clause (b) of article (2)] of Part B of the First Schedule shall make an application in writing to an officer specially appointed in this behalf by the State Government by notification in the Official Gazette and thereupon such officer shall, after giving the applicant an opportunity of being heard and after making such enquiry (if any) as he may think fir, make an order,-

(i) if he is satisfied that the requirements of this Act and the rules made thereunder have been complied with, allowing the application, or

(ii) if he is not so satisfied, rejecting the application, and such order shall, subject to the provisions of clause (c) be final.

(c) The State Government may, on application or of its own motion, revise any order made under clause (b).

(3) Electricity duty shall not be leviable [on the net charge for energy consumed or the units of energy consumed as recorded in the meter, as the case may be,]-

(a) by any Government, except tot eh extent specified in the Second Schedule;

(b) by, or in respect of, any - (i) local authority, (ii) railway administration as defined in the Indian Railways Act, 1890. (iii) institution or class of persons specified in the Second Schedule, Except the extent specified in the Second Schedule; (c) in any - (i) place of public worship, public burial or burning-ground or other place for the disposal of the dead, (ii) premises declared by the State Government to be used exclusively for purposes of public charity. (iii) vessel whether sea-going or inland."

8. Section 3 of the Bengal Electricity Duty Act, 1935 requires an industrial undertaking claiming the benefits of the special rate of duty to make an application in writing to an officer specially appointed in this behalf by the State Government. Such officer, thereafter, will consider such application in accordance with law and may grant approval to such application. Apparently, the first petitioner had made an application to such effect and was granted approval for the special rate which it had enjoyed for the period from July 3, 2006 till July 2, 2011.

9. The West Bengal Incentive Scheme, 2004 provides for a ceiling of the quantum of total incentive that may be received by an eligible industrial undertaking. Clause

20(e)(iii) of the West Bengal Incentive Scheme, 2004 provides that, the total value of incentive shall not exceed 100% of the fixed capital investment in any case. Clause 10 of the West Bengal Incentive Scheme, 2004 provides for waiver of electricity duty. It provides that, an eligible unit, for its approved project, will be entitled to waiver of electricity duty on the electricity consumed, for its production/operation activity for a period of 5 years, from the date of commercial production and operation. The amount of incentive received by the first petitioner under the Scheme of 2004 is admitted. Such amount is Rs.2,116.49 Lakhs. 100% fixed capital investment of the first petitioner is Rs.1,436.64 Lakhs. This figure is also admitted. The respondents claim that, they have paid the first petitioner in excess of Rs.6,79.85 Lakhs as the first petitioner has received such amount in excess of the ceiling of Rs.1,436.64 Lakhs.

10. This is the third writ petition at the behest of the petitioners. The first writ petition was W.P. No. 17953 (W) of 2014. The same was disposed of by an Order dated June 27, 2014 setting aside the demand for Rs.6,79.85 Lakhs and directing the authorities to pass a fresh order after hearing the parties. The second writ petition was W.P. No. 19690 (W) of 2014, which was disposed of by an Order dated April 9, 2014. Noticing such two orders, the impugned order has been passed. The impugned order finds that, the period of receipt of waiver of the electricity duty has expired subsequent to five years from the date of grant of the same. The first petitioner had received excess payments from the Government. The impugned order has,

therefore, proceeded to direct the first petitioner to pay the sum in three equal installments within 30 days commencing from the date of the impugned order. In default, the impugned order has directed payment of interest in terms of the rates of the Reserve Bank of India. The impugned order is reasoned. It has not been substantiated at the hearing that, under the Bengal Electricity Duty Act, 1935 a person is entitled to an automatic benefit of remission of electricity duty payable. An applicant has to apply for receipt of such benefit. The application has to be assessed. In the present case, the officer authorized for such purpose under the Act of 1935 has granted the first petitioner the benefit of duty waiver. The eligibility certificate issued to the first petitioner specifies that, the receipt of benefits of duty waiver would be

considered as a benefit under the Scheme of 2004. The petitioner had accepted such position and had acted thereon. Therefore, the petitioner now cannot be allowed to contend that, duty waiver under the Act of 1935 is beyond the Scheme of 2004 and is independent thereto. The first petitioner having received excess payment, the impugned order correctly directs the first petitioner to refund the sum along with interest in the case of default. The State Government has, therefore, extended a benefit to the first petitioner under the Scheme of 2004.

11. In such circumstances, I find no merit in the present cast. W.P. No. 26172 (W) of 2015 is dismissed. No order as to costs.

12. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the

requisite formalities.

